STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 15, 2004
v	No. 241866 Wayne Circuit Court
GREGORY ALAN PARKS, Defendant-Appellant.	LC No. 01-011596-01

Before: Owens, P.J. and Kelly and R.S. Gribbs*, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of misconduct in office, a common law offense, pursuant to MCL 750.505 for which the trial court sentenced him to eighteen months' probation. We affirm.

I. Basic Facts

In August 2001, Taylor police were conducting surveillance on a suspected crack house. During this surveillance, the victim met her boyfriend Brent McLeese at the house. At the time, the victim was on probation for giving false information to a police officer. As McLeese and the victim drove away, police stopped them, purportedly on suspicion of a stolen license plate. The victim offered to give the officers narcotics information. Defendant handcuffed her, placed her in the patrol car, and searched her purse, finding a crack pipe and a lighter, which he put in the glove compartment of the patrol car. The victim's possession of narcotics paraphernalia was a violation of her probation. Nonetheless, defendant allowed the victim to exit the patrol car, but asked for her cellular phone number and her home telephone number.

Approximately thirty minutes later, defendant called the victim telling her he was off duty and suggesting that they meet. According to the victim, defendant said it was in her best interest to meet him. The victim agreed to meet defendant at a strip mall parking lot where the stores were all closed. Before going, she called McLeese and asked him to drive separately to the arranged meeting spot. McLeese agreed, but was delayed by a train. In the parking lot, defendant sat in the victim's car and the two talked about having sexual intercourse. The victim stated she would not have sexual intercourse with defendant because they did not have a condom. Instead, the victim indicated that she would perform fellatio on defendant. He agreed.

*Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

When defendant ejaculated, the victim spit the semen into a napkin, which she retained. As she left, she asked defendant if she was in trouble. He said she was not.

When the victim ultimately met up with McLeese, the two decided to put defendant's semen in a cup and take it to the police station. The victim also gave the police the clothes that she had been wearing during her encounter with defendant. A subsequent search of defendant's duty bag uncovered the drug paraphernalia from the victim's purse. At trial, Sergeant David Cromwell testified that although it is within an officer's discretion to charge for possession of minor drug paraphernalia, officers are not free to dispose of the evidence. He also indicated that it is unusual to place evidence in a duty bag because it disrupts the chain of custody. During questioning, defendant denied knowing that the victim was on probation and that he accepted a sexual favor in exchange for not reporting her probation violation. Defendant acknowledged that it was wrong to have sexual relations with the victim, but stated that he did it only for the "sex thrill."

II. Defendant Was Properly Charged Under MCL 750.505

Defendant first contends that he was wrongly prosecuted under MCL 750.505 because the statute applies only when "no provision is expressly made by any statute of this state" for the punishment of the alleged offense. Defendant argues that this requirement is not satisfied because his alleged conduct falls under the purview of MCL 750.123 and MCL 752.11. We disagree. This is a question of law that we review de novo on appeal. *People v Milton*, 257 Mich App 467, 470; 668 NW2d 387 (2003).

MCL 750.505 provides:

> Any person who shall commit any indictable offense at the common law, for the punishment of which no provision is expressly made by any statute of this state, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 5 years or by a fine of not more than $10,000.00 or both in the discretion of the court.

"Misconduct in office" is an indictable offense at common law and subject to prosecution under MCL 750.505. *Milton, supra* at 470. In *Milton,* this Court set forth the elements of misconduct in office:

> A charge of misconduct is sustainable when it sets forth (1) malfeasance, committing a wrongful act, or (2) misfeasance, performing a lawful act in a wrongful manner, or (3) nonfeasance, failing to do an act required by the duties of the office.
>
> To convict on the charge of misconduct in office, the prosecutor must prove that the defendant (1) is a public officer, (2) the misconduct occurred in the exercise of the duties of the office or under the color of the office, and (3) is corrupt behavior. "'Corruption,' as an element of misconduct in office, is used in the sense of depravity, perversion or taint." "Pursuant to the definitions [of depravity, perversion, and taint], a corrupt intent can be shown where there is

> intentional or purposeful misbehavior or wrongful conduct pertaining to the requirements and duties of office by an officer." [*Id.* at 471 (citations omitted).]

Defendant's conduct does not fall under MCL 750.123, which generally prohibits a police officer from taking bribes. Defendant's encounter with the victim involved more than a bribe: defendant was charged with using his power as a police officer to coerce the victim to have sex with him. Because the alleged conduct was not merely acceptance of a bribe, it does not fall squarely within the parameters of MCL 750.123. Nor does 750.123 fully cover the wrongfulness of defendant using his power over the victim to procure her sexual services.

Defendant's conduct also does not fall under MCL 752.11, which provides that a public official "who wilfully and knowingly fails to uphold or enforce the law with the result that any person's legal rights are denied is guilty of a misdemeanor." Affirmative misconduct does not fall under MCL 752.11, which addresses omissions. *People v Thomas*, 438 Mich 448, 454; 475 NW2d 288 (1991). The prosecutor did not allege that defendant omitted to uphold or enforce the law. Instead, the prosecutor alleged that defendant committed an affirmative act of misconduct.

Therefore, we conclude the prosecution properly charged defendant with misconduct in office under MCL 750.505.[1]

III. Ineffective Assistance of Counsel

Defendant also argues that he was denied effective assistance of counsel. We disagree.

To establish ineffective assistance of counsel, a defendant must show (1) that defense counsel did not perform as "counsel" guaranteed by the Sixth Amendment and (2) that the deficient performance prejudiced the defense. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). A defendant claiming ineffective assistance of counsel must overcome the strong presumption that defense counsel was exercising sound strategy. *Id.* To demonstrate prejudice, the defendant must show a reasonable probability that but for defense counsel's error, the result would have been different. *Id.*

Defendant asserts that defense counsel was ineffective because he missed opportunities to attack the victim's credibility, especially with respect to her financial motives and intoxication. Defense counsel's decisions to prioritize, and focus on some angles more than others, and to avoid incongruous and contradictory defense theories, are matters of strategy, and may represent a better strategy than confusing and overwhelming the jury with every available inconsistency and weakness in the complainant's testimony. Defendant has failed to overcome the presumption of sound strategy.

Defendant also argues that defense counsel was ineffective for failing to object when the prosecutor referred to defendant as a former police officer, or when Crowell testified that

[1] Accordingly, defense counsel did not err in failing to make a dispositive motion on these grounds.

defendant had been dismissed, and should be called "former Officer Parks." At the *Ginther*[2] hearing, defense counsel testified that he and defendant discussed the advantages and disadvantages of revealing defendant's termination. They jointly decided that it might engender sympathy for defendant if the jury knew he had been terminated. This was a legitimate trial strategy.

Defendant also argues that defense counsel was ineffective for failing to use other acts evidence admissible under MRE 404(b), as evidence of past acts to prove "scheme, plan, or system." He argues that the evidence would not have been precluded by MRE 404(a)(3), and MCL 750.520j, which exclude evidence of a sex crime victim's past sexual conduct with limited exceptions. Even so, defense counsel's failure to attempt to introduce this evidence did not constitute ineffective assistance of counsel. The victim's interview with Turner appears to be the only evidence available that the victim previously used sex to curry favor with a police officer. But contrary to defendant's argument that this evidence shows the victim's recurring scheme of offering to have sex with police officers who have cause to arrest her, it actually portrays the victim as a repeat victim of police abuse and a lifelong victim of sexual abuse. If defense counsel had used the most helpful portions of the statement to impeach the victim, the prosecutor would have been entitled to introduce the entire context of the statement, pursuant to MRE 106. Defense counsel's decision to avoid this evidence was sound trial strategy.

Defendant also claims that defense counsel was ineffective for not objecting when the trial court responded to the jury's request for the "elements" by sending the jury only the elements, without the additional special instruction that the specific act of misconduct was sexual coercion. But the trial court specifically stated that it was sending only the four elements of the charged offense because that was all the jury requested. Further, given the overall presentation of the evidence in this trial, it is unlikely that the jury was confused by the trial court's response to their request. Accordingly, defense counsel was not ineffective in this regard.

IV. The Complainant's Prior Conviction

Defendant next argues that the trial court erred in excluding evidence that the victim was previously convicted of giving false information to a police officer, in violation of a city of Southgate ordinance. Defendant contends that the evidence was admissible for impeachment under MRE 609, which permits evidence that a witness has been convicted of a crime with an element of dishonesty when "the evidence has been elicited from the witness or established by public record during cross examination." We agree, but the error was harmless.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). "An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no excuse for the ruling made." *Id.* An error in the admission or the exclusion of evidence is not ground for reversal unless refusal to take this action appears to the court inconsistent with substantial justice. MCR 2.613(A); MCL 769.26. The defendant

[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

claiming error must show that it was more probable than not that the alleged error affected the outcome of the trial, in light of the weight of the properly admitted evidence. *People v Whittaker*, 465 Mich 422, 427-428; 635 NW2d 687 (2001).

Even assuming the trial court erred in excluding evidence of the victim's conviction, the error was harmless. The victim had already testified, on direct examination, that when defendant retrieved her records on his display terminal, it showed that she was on probation for "false information or something." The jury was thus aware that the victim had committed a prior offense involving dishonesty. Further, an examiner's questions regarding a witness's crimes related to dishonesty "must be limited to the fact of conviction and the nature of the crime; he may not go into the details or circumstances surrounding the crime . . . ." *People v Rappuhn*, 390 Mich 266, 274 n 2; 212 NW2d 205 (1973). The mere fact that the victim committed this offense, without any information as to the surrounding circumstances would not establish that she chronically lies to, manipulates, and falsely accuses police officers. Therefore, we conclude that defendant is not entitled to relief on the basis of the trial court's MRE 609 ruling. Nor was defense counsel ineffective for failing to pursue this matter.

V. Prosecutorial Misconduct

Defendant also argues that he was denied fair trial because of prosecutorial misconduct. We disagree.

We review claims of prosecutorial misconduct de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial, i.e., whether prejudice resulted. *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999). Prosecutorial misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *Id.* at 272-273. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

Defendant argues that the prosecutor improperly bolstered the victim's testimony by referencing the police department's investigation into the victim's complaint. A prosecutor may not vouch for a witness's credibility or suggest that the government has some special knowledge that a witness's testimony is truthful. *Knapp, supra* at 382. A prosecutor may, however, argue from the facts that a witness is credible or that the defendant or another witness is not worthy of belief. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1998). The complained of statement does not constitute improper vouching. There were several references to the investigation in the trial, so the prosecutor did not ask jurors to look beyond the evidence. Nor did the prosecutor ask jurors to find the victim truthful because the police department found her truthful; rather, she asked jurors to keep an open mind as the department investigators did. Therefore, we conclude that this statement did not constitute prosecutorial misconduct.

Defendant also claims that the prosecutor argued for a conviction based on sympathy for the victim. Appeals to the jury to sympathize with a victim constitute improper argument. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). But this Court will not reverse where the prosecutor makes only an isolated comment, and where the appeal to jury sympathy is not blatant or inflammatory. *Id.* The two allegedly improper statements were only

brief references. The statements were not inflammatory, maudlin, or emotional. The remark that the victim was probably used to being mistreated was not a blatant attempt to win the jury's sympathy, but related to the prosecutor's theory that defendant targeted his alleged misconduct against someone who seemed unlikely to stand up for herself. The request for jurors to put themselves in the victim's place also was not a blatant appeal for sympathy, but apparently intended to give context to the jury's evaluation of her demeanor when assessing her credibility. Further, the trial court instructed the jury that it "must not let sympathy or prejudice influence [its] decision."

Defendant also argues that the prosecutor made improper civic duty arguments, and made arguments which implied that defendant engaged in other acts of misconduct. A prosecutor "need not confine argument to the 'blandest of all possible terms,' but has wide latitude and may argue the evidence and all reasonable inferences from it." *Aldrich, supra* at 112, quoting *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989). However, the prosecutor "should not resort to civic duty arguments that appeal to the fears and prejudices of jury members . . . ." *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). The prosecutor asked the jurors to bring defendant to justice based on the evidence of his guilt. This was not improper. Further, we do not believe the language, "so that this officer could not take advantage of one more person," insinuated that defendant had committed other acts of misconduct.

Defendant also objects to a statement from the prosecutor's closing argument, which defendant characterizes as "a call by the prosecution to convict on acts not brought out in Officer Parks' case." These comments were not improper. The prosecutor did not compare defendant's conduct to that of President Clinton or priests who abused boys; rather, she used these examples to illustrate the point that no one, including police officers, is above the law.

Defendant also bases his prosecutorial misconduct claim on a portion of the rebuttal argument. Read in context, the statement indicates that a police officer's work brings many opportunities for corrupt behavior, such as keeping drugs or drug money found in the course of duty, or receiving sexual favors from prostitutes in lieu of charging them with criminal conduct. The prosecutor was arguing that police officers must resist these temptations, and that one who fails to do so is guilty of misconduct. This was not improper.

Defendant also claims that the prosecutor shifted the burden of proof, and drew an adverse inference from defendant's decision not to testify. We conclude that the prosecutor did not shift the burden of proof or make adverse inferences from defendant's decision to remain silent. It was, in fact, uncontroverted that defendant, a police officer, made contact with the victim during a traffic stop, and that thirty minutes later he called her. The prosecutor was not suggesting that defendant stipulated or agreed to the prosecutor's version of the events that followed defendant's telephone call to the victim.

Defendant also claims that the prosecutor denigrated defense counsel during her rebuttal. A prosecuting attorney may not personally attack defense counsel. *People v Phillips*, 217 Mich App 489, 498; 552 NW2d 487 (1996). But we do not agree that the hypothetical example of implied bribery accused all criminal defense attorneys of dishonesty, or attacked the integrity of defense counsel. The statement presented one hypothetical scenario, without suggesting that this behavior is widespread, typical of all defense attorneys, or characteristic of defense counsel's

professional ethics. Moreover, the hypothetical prosecutor in the scenario acted just as corruptly as the hypothetical defense counsel.

Because none of the comments cited constitute prosecutorial misconduct, defense counsel was not ineffective for failing to object.

VI. Sufficiency of the Evidence

Defendant also argues that there was insufficient evidence to sustain his conviction. We disagree.

When a defendant challenges the sufficiency of the evidence in a criminal case, this Court considers whether the evidence, viewed in a light most favorable to the prosecution, would warrant a rational juror to find guilt beyond a reasonable doubt. *People v Sexton*, 250 Mich App 211, 222; 646 NW2d 875 (2002).

Viewing the evidence in a light most favorable to the prosecution, we conclude that there was sufficient evidence to establish that the victim performed the fellatio under the duress of defendant's coercive conduct. According to the victim, less than an hour after defendant caught her possessing narcotics paraphernalia, defendant called her stating that it was in "her best interests" to meet him in a dark parking lot after his shift ended. She also testified that defendant knew she was on probation, and that the narcotics paraphernalia could be particularly damaging to her. Defendant had no legitimate reason for contacting the victim when off duty, and no reason to expect the victim to have any freely formed interest in seeing him. The after-hours strip mall parking lot had little to recommend itself for a meeting place other than its suitability for a discrete encounter. From these circumstances, the jury could reasonably find that the victim performed the fellatio under duress. Viewed in a light most favorable to the prosecution, the evidence was sufficient to support defendant's conviction.

VII. Motion for New Trial

Defendant also argues that the trial court erred in denying his motion for a new trial based on newly discovered evidence. We review the trial court's decision on a motion for a new trial for an abuse of discretion. *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000).

To warrant a new trial on the basis of newly discovered evidence, the defendant must show that the evidence itself, not just its materiality, (1) is newly discovered, (2) is not merely cumulative, (3) probably would have caused a different result, and (4) was not discoverable and producible at trial with reasonable diligence. *People v Bass (On Rehearing)*, 223 Mich App 241, 262; 565 NW2d 897 (1997), order vacated in part on other grounds 457 Mich 866 (1998). But newly discovered evidence is not grounds for a new trial where it would merely be used for impeachment purposes, or where it relates only to a witness' credibility. *Id.* at 262. Evidence of The victim's plan or scheme is properly characterized as credibility evidence. The June 2003 incident does not directly reveal any information about what happened between the victim and defendant in August 2001. Instead, the evidence bears upon which party is more credible. We will not reverse the trial court's order because it reached the right result, even if it was for the wrong reason. *People v Goold*, 241 Mich App 333, 342 n 3; 615 NW2d 794 (2000).

Affirmed.

/s/ Donald S. Owens
/s/ Kirsten Frank Kelly
/s/ Roman S. Gribbs